

**REMARKS**

Reconsideration of the Application respectfully is requested. For the reasons indicated hereafter the Application is urged to be in condition for allowance.

The form of the Application at the first paragraph of the Specification has been modified as requested by the Examiner. Also, the additional botanical information requested at the bottom of Page 10 of the Official Action has been provided. It respectfully is submitted that those skilled in plant technology will have no difficulty in identifying plants of the 'Meivaleir' variety in view of Applicant's detailed Specification and photograph. The withdrawal of the rejection under 35 U.S.C. § 112 is urged to be in order and is respectfully requested.

The continued rejection of the claim under 35 U.S.C. §102(b) is urged to be incapable of withstanding detailed analysis for the reasons set forth in detail in Applicant's submission of March 25, 2003. For a plant to enter the public domain one must look to the statutory language as it has existed and been interpreted for over seventy years. There must be public use or sale in the United States for a sufficient time prior the United States filing date in order to create a statutory bar. This has not occurred as indicated in Applicant's submission of March 25, 2003. The Examiner has cited no authority for assertion that the availability an invention outside the United States combined with a non-enabling publication has ever been used to create a statutory bar other than the *Ex parte Thomson* decision. For the reasons indicated in Applicant's submission of March 25, 2003,

the controlling authority continues to be the *In re LeGrice* decision that was rendered by the Court of Customs and Patent Appeals. A factual situation directly comparable to that of the present Application was there presented and patentability was found. It respectfully is submitted that there is no sound reason for Patent Office personnel to put forth at this time a different interpretation of the statute from that which has been consistently followed for decades. Such new interpretation is urged to be inappropriate as well as unfair to Applicant.

Plant publications should be disregarded when making a patentability analysis with respect to a new plant variety unless they can be combined with the existing scientific "store of knowledge in the fields of plant heredity and plant eugenics which one skilled in the art will be presumed to possess" so as to enable another to produce the plant. The mere possibility to seek an invention in a foreign country and to bring it to the United States has never been an impediment to patent protection in any area of technology with or without the presence of a non-enabling publication in the absence of a showing that the invention was on sale or in public use in the United States more than one year before the United States filing date. As specified at 35 U.S.C. § 161, Plant Patents and Patents for other inventions should be subject to the same statutory provisions "except as otherwise provided." Title 35 provides no exception capable of supporting a different rule for Plant Patents. The statute has been misapplied in the Official Action. Accordingly, the withdrawal of the 35 U.S.C. § 102(b) rejection is in order and likewise is requested.

If any additional information is required please contact the undersigned attorney so that the matter can be discussed and resolved at a personal interview.

Respectfully submitted,

BURNS, DOANE, SWECKER & MATHIS, L.L.P.

Date: August 6, 2003

By: Benton S. Duffett Jr.  
Benton S. Duffett, Jr.  
Registration No. 22,030

P.O. Box 1404  
Alexandria, Virginia 22313-1404  
(703) 836-6620

**Marked-Up Copy of Substitute Specification Filed August 6, 2003****BOTANICAL/COMMERCIAL CLASSIFICATION***Rosa hybrida* / Climbing Rose Plant**VARIETAL DENOMINATION**

cv. 'Meivaleir'

**Summary of the Invention**

The new variety of *Rosa hybrida* Climbing rose plant was created by artificial pollination wherein two parents were crossed which previously had been studied in the hope that they would contribute the desired characteristics. The female parent (i.e., the seed parent) ~~of~~ was the 'Meipalsar' variety (non-patented in the United States). The male parent (i.e., the pollen parent) was the product of the pollination of the 'Korwest' variety (non-patented in the United States) and the 'Circus' variety (United States Plant Patent No. 1,382). The parentage of the new variety can be summarized as follows:

'Meipalsar' × ('Korwest' × 'Circus').

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

The seeds resulting from the above pollination were sown and small plants were obtained which were physically and biologically different from each other. Selective study resulted in the identification of a single plant of the new variety.

It was found that the new variety of rose plant of the present invention possesses the following combination of characteristics:

- (a) exhibits a climbing growth habit,
- (b) abundantly forms attractive double blossoms having a luminous yellow-orange coloration,
- (c) forms dense medium green semi-glossy foliage that contrasts well with the light-colored blossoms,
- (d) exhibits good vigor, and
- (e) is particularly well suited for growing as attractive ornamentation in the landscape.

The new variety well meets the needs of the horticultural industry and can be grown to advantage in parks and gardens.

The new variety of the present invention can be readily distinguished from its ancestors. More specifically, the 'Meipalsar' variety displays copper-colored blossoms, the 'Korwest' is a Shrub rose plant with ovoid-shaped buds, and the

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

'Circus' variety is a Floribunda rose plant with urn-shaped buds. In contrast the buds of the new variety display a conical configuration.

The new variety has been found to undergo asexual propagation in France by a number of routes, including budding, grafting, and cuttage. Asexual propagation by the above-mentioned techniques in France has shown that the characteristics of the new variety are stable and are strictly transmissible by such asexual propagation from one generation to another.

The new variety has been named the 'Meivaleir' variety.

**Brief Description of the Photograph**

The accompanying photograph shows as nearly true as it is reasonably possible to make the same, in a color illustration of this character, typical specimens of the plant parts of the new variety. The rose plants of the new variety were two years of age and were observed during June while budded on *Rosa froebelli* understock and growing in outdoors at Le Cannet des Maures, Var, France. Dimensions in centimeters are indicated at the bottom of the photograph.

Fig. 1 - illustrates a specimen of a young shoot;

Fig. 2 - illustrates a specimen of a floral bud before the opening of the sepals;

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

Fig. 3 - illustrates a specimen of a floral bud at the opening  
of the sepals;

Fig. 4 - illustrates a specimen of a floral bud at the opening  
of the petals;

Fig. 5 - illustrates a specimen of a flower in the course of  
opening;

Fig. 6 - illustrates a specimen of an open flower - plan  
view - obverse;

Fig. 7 - illustrates a specimen of an open flower - plan  
view - reverse;

Fig. 8 - illustrates a specimen of a fully open flower - plan  
view - obverse;

Fig. 9 - illustrates a specimen of a fully open flower - plan  
view - reverse;

Fig. 10 - illustrates a specimen of a floral receptacle  
showing the arrangement of the stamens and  
pistils;

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

- Fig. 11 - illustrates a specimen of a floral receptacle  
showing the arrangement of the pistils (stamens  
removed);
- Fig. 12 - illustrates a specimen of a flowering stem;
- Fig. 13 - illustrates a specimen of a main branch;
- Fig. 14 - illustrates a specimen of a leaf with three leaflets -  
plan view - upper surface;
- Fig. 15 - illustrates a specimen of a leaf with five leaflets -  
plan view - under surface; and
- Fig. 16 - illustrates a specimen of a leaf with seven leaflets -  
plan view - upper surface.

Detailed Description

The chart used in the identification of the colors is that of the Royal Horticultural Society (R.H.S. Colour Chart). The description is based on the observation of two year-old plants during June while budded on *Rosa froebelli* understock and growing outdoors at Le Cannet des Maures, Var, France. The coloration in more common terms precedes reference to the chart in some instances. Such terminology is to be accorded its ordinary dictionary significance.



**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

CLASS: Climbing.

PLANT:

height -- approximately 150 to 170 cm in  
cane length at the end of the  
growing season.

habit -- climbing.

BRANCHES:

color -- young stems: near Yellow-Green  
Group 146C.

-- adult wood: near Yellow-Green  
Group 146A and 146B.

thorns -- size: medium (as illustrated).

-- quantity: moderately numerous (as  
illustrated).

-- color: near Greyed-Orange Group  
164B at the base and near Greyed-  
Orange Group 164A and 164B at the  
tip.

**Marked-Up Copy of Substitute Specification Filed August 6, 2003****LEAVES:**

- configuration: deeply concave on the lower surface.
- stipules -- adnate, pectinate, and rather broad.
- petioles -- near Yellow-Green Group 146B on its upper surface and near Yellow-Green Group 153D on the under surface.
- leaflets -- number: 3, 5, and 7.
- shape: elliptic, the base is generally symmetrical and obtuse and the tip is generally symmetrical with a broad point (as illustrated).
- serration: regular (as illustrated).
- texture: consistent, and rather firm.
- general appearance: very dense, medium green, and semi-glossy foliage.

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

- color (young foliage):  
upper surface: near Green Group 139A and widely suffused with Greyed-Red Group 178B.  
under surface: near Yellow-Green Group 147C and widely suffused with Greyed-Red Group 178B.
- color (adult foliage):  
upper surface: near Green Group 139A.  
under surface: near Yellow-Green Group 147C.

**INFLORESCENCE**

- number of flowers -- on the main stem there commonly are approximately 7 to 10 inflorescences with each inflorescence commonly bearing one

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

or two flowers. The inflorescences appear on both old and new wood.

bearing -- Commonly a shoot will first bear blooms at its terminus and upper axils and subsequently may develop axillary flowers below later in the same season. In the subsequent year flowers develop further down along older portions of the stem.

peduncle pedicel -- near Yellow-Green Group 146D and suffused with near Greyed-Red Group 178C in coloration, and medium in size with aciculae and prickles. The length commonly ranges from approximately 31 to 60 mm, and the diameter commonly ranges from approximately 2 to 2.8 mm. On average the length commonly is approximately 39 mm

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

and the average diameter is  
approximately 2.3 mm. Flowers  
opening in the early part of the  
bloom cycle typically have pedicel  
lengths in the lower two-thirds of  
the range and flowers opening in the  
middle of the season commonly have  
pedicel lengths in the upper  
two-thirds of the range.

sepals

- upper surface: elongated, tomentose,  
and near Greyed-Green Group  
194B.
- under surface: near Yellow-Green  
Group 146B with slight anthocyanin  
coloration and commonly with only  
a few short extensions (as  
illustrated).

buds

- shape: conical.

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

- length: approximately 2.5 cm on average.
- color:
  - upper surface: Chrome Yellow, near Yellow-Orange Group 14C, and lightly suffused with Empire Rose, Red Group 48C.
  - under surface: Chrome Yellow, near Yellow-Orange Group 14C, and lightly suffused with Empire Rose, Red Group 48C.
- flower
  - shape: double and cup-shaped.
  - diameter: approximately 9 to 10 cm on average.
  - color (when opening begins):
    - upper surface: Chrome Yellow, near Yellow-Orange Group 14C, and lightly suffused with Empire Rose, Red Group 48C.

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

under surface: Chrome Yellow, near  
Yellow-Orange Group 14C, and  
lightly suffused with Empire Rose,  
Red Group 48C.

-- color (when blooming):

upper surface: Chrome Yellow, near  
Yellow-Orange Group 14C, and  
lightly suffused with Empire Rose,  
Red Group 48C.

under surface: Chrome Yellow, near  
Yellow-Orange Group 14C, and  
lightly suffused with Empire Rose,  
Red Group 48C.

-- color (at end of blooming):

upper surface: Chrome Yellow, near  
Yellow-Orange Group 14C, and  
lightly suffused with Empire Rose,  
Red Group 48C.

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

under surface: Chrome Yellow, near  
Yellow-Orange Group 14C, and  
lightly suffused with Empire Rose,  
Red Group 48C.

-- petal number: approximately 25 to  
39 on average.

-- stamen number: commonly  
approximately 52 on average.

-- filament color: near Yellow-Orange  
Group 17C.

-- Anther color: near Yellow-Orange  
Group 17C.

-- Pollen: present in a moderate  
quantity and pale yellow in  
coloration.

-- Pistil number: commonly  
approximately 73 on average.

-- Style color: near Red Group 50A.



**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

- Stigma color: near Yellow Group 13A.
- petal drop: The petals commonly detach cleanly under dry growing conditions, and may persist somewhat under rainy growing conditions.
- fragrance: none.
- lasting quality: long on the plant.  
A typical blossom commonly lasts approximately 7 to 10 days on the plant depending upon the environmental conditions. Since the plant is primarily intended for providing ornamentation outdoors, the longevity of the blossoms when cut and placed in a vase has not been evaluated.

**Marked-Up Copy of Substitute Specification Filed August 6, 2003**

- petal shape: the tip is rounded, the base is obtuse, on the external petals the margin is reflexed and undulated, and on the internal petals the margin is undulated.
- receptacle: near Yellow-Green Group 146D in coloration, and funnel-shaped in longitudinal section.

**DEVELOPMENT**

- vegetation -- very vigorous and strong.
- blooming -- abundant.
- resistance to diseases -- very good with respect to Powdery Mildew and Black Spot even late in the growing season.